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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LARRY MCIVER.

) USDC No. 08 CV 0132 IEG WMC
)) Complaint Filed: January 23, 2008

Plaintiff.

)
) **MEMORANDUM OF POINTS AND
)) AUTHORITIES IN SUPPORT OF
)) DEFENDANT FRIT ESCONDIDO
)) PROMENADE, LLC'S MOTION**

1

TARGET CORPORATION dba

TO CONTINUE EARLY NEUTRAL

TARGET #274: COST PLUS, INC. dba) EVALUATION CONFERENCE

COST PLUS WORLD MARKET #145:) PENDING HEARING ON MOTION

FRIT ESCONDIDO PROMENADE TO DISMISS STATE LAW

LLC; LA Salsa, Inc. dba LA Salsa); CLAIMS AND RECLINE

93: APPLEBEE'S RESTAURANTS v. SUPPLEMENTAL JURISDICTION

WEST, LLC dba APPLEBEE'S

NEIGHBORHOOD BAR & GRILL

#5711: TOYS 'R' US – DELAWARE

INC, dba TOYS 'R' US #5633; PARTY) Time: 9:30 a.m.

CITY CORPORATION dba PARTY) Courtroom: C 1st Flr

CITY CORPORATION USA #1441) Courtroom: 3, 1st Floor
CITY OF ESCONDIDO #145:) Magistrate Judge: Hon. Wil

INLAND WESTERN MDS) Magistrate Judge: Hon. William
) McCurine, Jr.

INLAND WESTERN MDS) McCutcheon, Jr.
PORTFOLIO LLC)

PORTFOLIO, LLC,

Defendants) ORAL ARGUMENT NOT
) REQUIRED

Defendants:) **REQUERED**
)
)

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08 CV 0132 IEG WMc

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
DEFENDANT FRIT ESCONDIDO PROMENADE, LLC'S MOTION TO
CONTINUE EARLY NEUTRAL EVALUATION CONFERENCE

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:
2 PLEASE TAKE NOTICE THAT Defendant FRIT ESCONDIDO
3 PROMENADE, LLC, hereby moves the Court for an order continuing the Early
4 Neutral Evaluation Conference until after the Court rules on this moving
5 defendant's Motion to Dismiss the state law claims asserted against it in this
6 action.

7 This Motion is made on the grounds that the Court should continue the Early
8 Neutral Evaluation Conference, currently set for April 4, 2008, until after this
9 moving defendant's Motion to Dismiss is heard on April 28, 2008. Because the
10 Motion to Dismiss seeks the dismissal of all claims in which legal damages are
11 sought, prior resolution of that motion is crucial to any substantive settlement
12 negotiations with plaintiff. If the Early Neutral Evaluation Conference is held
13 before the Court rules on the Motion to Dismiss, then the parties will have no
14 realistic chance of reaching a substantive settlement, because plaintiff has
15 demanded legal damages on claims that are likely to be dismissed by the Court.

16 This Motion is based upon this notice, the concurrently filed memorandum
17 of points and authorities, the concurrently filed proposed order, the previously filed
18 Motion to Dismiss (Docket Entry No. 32), all documents and pleadings on file with
19 the Court in this matter, and upon such oral and documentary evidence as may be
20 presented at the hearing of this motion, if any.

21 Dated: March 18, 2008

SCHLICHTER & SHONACK, LLP

22 _____
23 /s/ - Steven C. Shonack
24 By: KURT A. SCHLICHTER
25 STEVEN C. SHONACK
26 Attorneys for Defendant FRIT
27 ESCONDIDO PROMENADE, LLC

28

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
2 **MOTION TO CONTINUE EARLY NEUTRAL EVALUATION**
3 **CONFERENCE**

4 **I. INTRODUCTION**

6 Although this action presents a familiar fact pattern to this Court—a claim
7 under the Americans with Disabilities Act (“ADA”) and related state law claims—
8 the nature and extent of the specific claims here makes this case a good candidate
9 to have the Early Neutral Evaluation Conference (“ENE Conference”) continued
10 for a short period of 45-60 days. The primary reason a continuance is sought is so
11 the Court can rule on the Motion to Dismiss the state law claims that has been filed
12 by this moving defendant, FRIT Escondido Promenade, LLC (“FRIT Escondido”).
13 The Motion to Dismiss is set to be heard before Judge Gonzalez on April 28, 2008.
14 See Docket Entry No. 32.

15 As set forth below, and discussed in more detail in the Motion to Dismiss,
16 resolution of that motion will determine whether plaintiff will be able to pursue
17 statutory damages against FRIT Escondido for the alleged ADA violations. If the
18 motion is granted, then plaintiff will be limited only to the equitable remedies
19 available under the ADA, and the parties can focus their efforts on resolving those
20 issues. If the motion is still pending at the time of the ENE Conference, then
21 plaintiff will demand legal damages under the state law claims that are likely to be
22 dismissed by the Court. In that scenario, it is highly unlikely that a settlement will
23 be reached because there will remain a substantive dispute as to the scope of
24 plaintiff’s remedies. To maximize the possibility for settlement at the ENE
25 Conference, the Court should order that it be continued until after the Court rules
26 on the Motion to Dismiss and the parties have a clear understanding of the true
27 nature and scope of the action and available remedies.

1 **II. PROCEDURAL HISTORY**

2 On January 23, 2008, plaintiff Larry McIver, by his counsel Lynn Hubbard,
 3 filed suit against FRIT Escondido and seven other defendants, alleging a long list of
 4 claimed ADA violations at the Escondido Promenade shopping center in Escondido.
 5 *See* Docket Entry No. 1. Plaintiff's complaint not only includes a claim for violation
 6 of the ADA, but also appends three intertwined state law claims—alleging violation
 7 of the Unruh Civil Rights Act (“Unruh Act”), violation of the California Disabled
 8 Persons Act (“Disabled Persons Act”), and violation of certain provisions of the
 9 California Health & Safety Code.

10 This Court issued its order setting the ENE Conference on February 21, 2008,
 11 three days after the first two defendants in this action filed their responsive pleadings.
 12 *See* Docket Entry No. 22. The Court set the ENE Conference for April 4, 2008.

13 Many of the defendants, including FRIT Escondido, were granted extensions
 14 of time to file a responsive pleading. Indeed, not all of the parties have yet filed a
 15 responsive pleading. Defendant Applebee's Restaurants West, LLC, have been
 16 granted an extension to file a responsive pleading to March 24, 2008. *See* Docket
 17 Entry No. 24. Defendant Target Corporation has also not yet filed a responsive
 18 pleading or otherwise appeared in the action.

19 FRIT Escondido was granted an extension to file its responsive pleading to
 20 March 20, 2008. *See* Docket Entry No. 13. On March 14, 2008, FRIT Escondido
 21 filed a Motion to Dismiss the three state law claims. *See* Docket Entry No. 32. That
 22 motion is set to be heard before Judge Gonzalez on April 28, 2008.

23 On March 14, 2008, plaintiff served his Early Neutral Evaluation Statement, in
 24 which he demanded statutory damages under the state law claims against FRIT
 25 Escondido. Statutory damage demands were also made against each of the other
 26 defendants.

1 **III. THE COURT IS VERY LIKELY TO DISMISS THE STATE LAW**
 2 **CLAIMS AND PLAINTIFF WILL NOT BE ENTITLED TO SEEK OR**
 3 **RECOVER STATUTORY DAMAGES**

4 Courts in this District have consistently declined to exercise supplemental
 5 jurisdiction over Unruh Act claims in ADA cases, per 28 U.S.C. § 1367, and, upon
 6 motion, have dismissed such claims under Federal Rule of Civil Procedure (“FRCP”)
 7 Rule 12(b)(1). *Oliver v. Longs Drug Stores California, Inc.*, No. 07cv2302 IEG,
 8 2008 U.S. Dist. LEXIS 14341 at *6-7 (S.D. Cal. Feb. 25, 2008); *Oliver v. GMRI,*
 9 *Inc.*, No. 07cv1719 IEG, 2007 WL 4144995 (S.D. Cal. Nov. 19, 2007); *Wilson v.*
 10 *PFS, LLC*, 493 F.Supp.2d 1122 (S.D. Cal. 2007).

11 In each case, the Court has found that there is an irreconcilable conflict
 12 between California courts and the Ninth Circuit as to the applicability of the
 13 “discriminatory intent” requirement of the Unruh Act. The Ninth Circuit has held
 14 that no showing of discriminatory intent is required for statutory damages under
 15 the Unruh Act. *Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837, 846-47 (9th Cir.
 16 2004). California Courts, however, have disapproved *Lentini*, and substantive law
 17 in California continues to hold that a showing of discriminatory intent is required
 18 under the Unruh Act. In *Gunther v. Lin*, 144 Cal.App.4th 223, 252-257 (2006), the
 19 California Court of Appeal explicitly rejected the Ninth Circuit’s holding in
 20 *Lentini*, concluding that “the *Lentini* court’s analysis cannot be considered an
 21 accurate statement of California law.” *Gunther, supra*, 144 Cal.App.4th at 252.

22 This presents an irreconcilable conflict between the Ninth Circuit and
 23 California Courts as to whether a plaintiff must prove discriminatory intent to be
 24 awarded statutory damages under the Unruh Act. When faced with these exact
 25 same type of claims, the Court has correctly ruled that such an issue presents a novel

1 and complex question of state law that should be considered in state court and not in
2 a lawsuit in this District as a matter of comity.

3 Furthermore, this Court has also correctly declined to exercise supplemental
4 jurisdiction over the other state law claims, because they are so intertwined with the
5 Unruh Act claim that they also are inappropriate for resolution in the federal forum.

6

7 **IV. PLAINTIFF AND FRIT ESCONDIDO WILL NOT HAVE A**
MEANINGFUL OPPORTUNITY FOR SETTLEMENT UNTIL THE
MOTION TO DISMISS IS RULED UPON

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10 As set forth above, plaintiff is seeking statutory damages against FRIT
11 Escondido. Such damages are based entirely on the state law claims that are the
12 subject of the Motion to Dismiss. No other legal damages are sought, and no such
13 remedies are available under the federal law claim for violations of the ADA. If the
14 ENE Conference is held before the Court rules on the motion, then plaintiff will
15 likely demand a settlement that includes at least a component of the state law
16 damages claim. FRIT Escondido has filed what it believes to be a meritorious
17 motion to dismiss those claims and does not believe that it is legally required to pay
18 any such damages. This unresolved situation will make it very difficult, if not
19 impossible, for the parties to reach or approach settlement without a major
20 concession from one side or the other. As a practical matter, this means that the ENE
21 Conference, if held on April 4, 2008, will have a minimal likelihood of resolving this
22 matter.

23

24 On the other hand, if the ENE Conference is continued until after the Court
25 rules on the Motion to Dismiss, the parties will be in a much better position to gauge
26 the true value of the case and participate in meaningful settlement discussions.
27 Regardless of which way the Court rules on the motion, the ruling will have a
significant impact on the parties' relative positions with respect to damages exposure

1 and settlement. If the motion is granted, then the parties can conduct negotiations
2 based solely on the equitable remedies available under the ADA. If the motion is
3 denied, then the parties will be able to address the entirety of plaintiff's claims. At
4 this time, however, it is premature for plaintiff to demand that any settlement include
5 compensation for legal damages, or for that matter, for FRIT Escondido to outright
6 deny consideration of any such claims. Once the parties have received the Court's
7 ruling, and know where they stand, they can fully and meaningfully participate in the
8 ENE Conference.

9

10 **V. CONCLUSION**

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12 For the foregoing reasons, FRIT Escondido prays that this Court continue
13 the ENE Conference in this matter to a date after the Court has ruled on the Motion
14 to Dismiss, which is currently set for hearing on April 28, 2008.

15

16 Dated: March 18, 2008

SCHLICHTER & SHONACK, LLP

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/s/ - Steven C. Shonack

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By: KURT A. SCHLICHTER

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STEVEN C. SHONACK

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Attorneys for Defendant FRIT
ESCONDIDO PROMENADE, LLC

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